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No. 90-1063

In the Supreme Court of the United States

OCTOBER TERM, 1990

HAULAWAY INCORPORATED, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion by not granting a mid-trial continuance of more than 24 days and by denying a motion for a new trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)	9
Hopkins v. *Britton*, 742 F.2d 1308 (11th Cir. 1984)	10
McLaughlin v. *Richland Shoe Co.*, 486 U.S. 128 (1988)	6
Salem v. *United States Lines Co.*, 370 U.S. 31 (1962)	10

Statutes and regulation:

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*	2
§ 7, 29 U.S.C. 207	2, 5
§ 11, 29 U.S.C. 211	6
§ 11(c), 29 U.S.C. 211(c)	2
§ 16(c), 29 U.S.C. 216(c)	6
Portal-to-Portal Acts of 1947, § 6(a), 29 U.S.C. 255(a)	6
29 C.F.R. 785.19	5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. PA40-PA45) is unreported. The opinion of the district court (Pet. App. PA4-PA38) is reported at 723 F. Supp. 274. The order of the district court denying petitioners' motion for a new trial (Pet. App. PA39) is unreported. The final judgment of the district court (Pet. App. PA1-PA3) is unreported.

JURISDICTION

The decision of the court of appeals was entered on August 22, 1990, and the petition for panel rehearing was denied on October 2, 1990 (Pet. App. PA46). The petition for a writ of certiorari was

filed on January 2, 1991 (the Wednesday following two holidays). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Haulaway Incorporated and Joseph Scugoza, its sole owner and president, are in the trash removal business. Pet. App. PA6. During the periods relevant to this case, Haulaway serviced four residential communities and four commercial routes in New Jersey. Its drivers worked a variable work week, depending on the route, day of week, and other factors and conditions. *Id.* at PA7-PA9, PA41. Petitioners did not keep records of actual hours worked, but kept track only of days worked and the weekly pay for each employee. The general practice was to pay each driver for a six-day, 48-hour week—regardless of how many more hours the employee had worked—with eight of those hours paid at double rate. *Id.* at PA12.

2. In July 1987, the Secretary of Labor filed suit against petitioners, alleging willful violations of the overtime and record keeping requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See 29 U.S.C. 207, 211(c). Pet. App. PA6, PA41. At the ensuing bench trial, the Secretary presented the testimony of a number of employees concerning the hours worked by them and their fellow employees, from which the amount of unpaid compensation could be calculated. *Id.* at PA7. Under the terms of the pretrial order, the Secretary next was to present testimony from the investigating compliance officer on "application of the statutory formula for overtime compensation and the method for calculating of overtime due, depending on the court's finding of hours worked," and to "submit [a post-

trial] exhibit listing the amount due each employee for incorporation into the Final Judgment." *Ibid.*; see also *id.* at PA9, PA42.

On the third day of trial, however, the court concluded that this approach was unsatisfactory, because it imposed on the court the task of deducing from the record the actual hours worked for each employee and did not require the Secretary to provide, until after the trial, a bottom-line figure on the unpaid overtime compensation that was owed. Accordingly, the court directed the Secretary to provide expert testimony on "the bottom line and the reasons for the bottom line and a schedule to back it up," and adjourned the trial for six days to permit the Secretary to develop the necessary data. Pet. App. PA10; see *id.* at PA9, PA42. After the six-day break, the compliance officer expanded his expected testimony on methodology, supported by illustrative examples, to include an unpaid overtime figure for each employee and a total figure (as later corrected) of $583,818.75. *Id.* at PA10-PA11. Among other things, the testimony demonstrated that, with regard to non-testifying employees, the typical six-day work week required 66 ¼ hours on average before 1987, a time period in which each driver's duty included washing the truck at the end of the day, and 60 hours after 1987, when that duty ceased. *Id.* at PA14-PA15, PA33; 723 F. Supp. at 280.[1]

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[1] The Petition Appendix contains an incorrect reproduction of the district court's opinion on this point. The last sentence in the second full paragraph of Pet. App. PA14 should read: "Using this approach Martoccia arrived at an average of 66 1/4 hours per week *for the period prior to 1987 and an average of 60 hours per week* for the period after January 1987." 723 F. Supp. at 280 (italicized language omitted from Petition Appendix).

To give petitioners the opportunity to prepare adequate cross-examination of this expanded testimony and to complete their alternative computations, the court continued the trial for three-and-one-half weeks, "when, presumably [petitioners] would be ready." Pet. App. PA15; see also *id.* at PA42, PA50. Upon the trial's resumption, petitioners cross-examined the compliance officer and presented an expert witness, who testified, based on a study of the routes and landfill/transfer station records, that the total unpaid overtime compensation was $200,875. *Id.* at PA17-PA18.[2] Later, petitioners submitted a post-trial brief that introduced new material purporting to discredit their own expert's estimate and to show total unpaid overtime compensation of $47,736, but also acknowledging a "worst-case scenario" of $233,731.79. *Id.* at PA19. The court rejected petitioners' post-trial attempt "to alter the evidence submitted by them and received at trial." *Id.* at PA20.

With regard to the overtime compensation calculations, the court found that "[b]oth the government's and [petitioners'] methods of computing overtime hours are imperfect devices necessitated by [petitioners'] inexcusable failure to keep adequate records." Pet. App. PA21. In particular, the court determined petitioners' approach to be "fatally flawed" for ten separate reasons. *Ibid.* For instance, petitioners' calculation took no account of the considerable time spent washing trucks before 1987 or waiting at the transfer stations and landfills after weigh-

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[2] Because petitioners failed to give the Secretary two weeks advance notice of their expert's conclusions, as the court had required, the Secretary was permitted to provide a post-trial affidavit criticizing this evidence. Pet. App. PA16, PA19-PA20.

ing in; it used an erroneous starting time for many routes; and, in many instances, it inflated the number of work shifts by counting a same-day return trip to a dump site as a separate shift, thus understating the amount of overtime. *Id.* at PA21-PA22. In contrast, the court found that the Secretary's approach was "basically sound." *Id.* at PA23. Nevertheless, it concluded that the Secretary's estimate was "[u]pwardly skew[ed]" by "exaggerations" in some of the workers' testimony of actual hours worked and by the the fact that petitioners were in substantial compliance with the overtime requirements toward the end of the relevant time period. *Id.* at PA24.[3] To compensate, the court discounted the Secretary's figure by 25%, reducing the amount of unpaid overtime to $437,862.56, and deemed the petitioners to have complied with all overtime requirements from April 1, 1989, onward. *Id.* at PA25.[4]

On the basis of its findings, the district court concluded that petitioners violated the Section 7 overtime requirements of the FLSA, and that they were

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[3] The court rejected petitioners' criticism that the Secretary's methodology failed to account for the employees' asserted taking of noncompensable breaks or performing of personal tasks during work time. Pet. App. PA23; see also 723 F. Supp. at 285 (petitioners' reproduction of the court's opinion is missing several key words at this point). The court found instead that any breaks taken were sufficiently brief and haphazard to be compensable (see 29 C.F.R. 785.19), and that any performance of personal tasks was sufficiently infrequent as not to affect the overall calculations. Pet. App. PA23-PA24; see also *id.* at PA43-PA44.

[4] For the latter period, the court held that any employee could bring a separate new action asserting a failure to pay overtime after April 1, 1989. Pet. App. PA25.

"in flagrant violation" of the Section 11 record keeping requirements. Pet. App. PA26-PA27. Applying *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), it held the violations to be "willful," thus invoking the three-year statute of limitations under Section 6(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 255(a). Pet. App. PA27. Moreover, petitioners' lack of good faith or reasonable grounds, including their "evasive, dilatory and obstructive conduct after [the Secretary] commenced [her] investigation," prompted the court to award liquidated damages "in an amount equivalent to the unpaid overtime compensation found due," in accordance with Section 16(c) of the FLSA, 29 U.S.C. 216(c). Pet. App. PA28. Finally, the court granted the Secretary's request for a prospective injunction "to ensure future compliance with both record keeping and overtime payment provisions of the Act." *Id.* at PA30; see also *id.* at PA1-PA3.

The court denied petitioners' motion for a new trial. Pet. App. PA39.

3. The court of appeals affirmed. Petitioners maintained that the continuance had been insufficient to permit them to prepare a defense against the government's expert witness, and that a new trial should have been ordered. The court of appeals rejected this argument. It emphasized the "broad discretion of the trial judge" in managing a trial (Pet. App. PA43), and held that the trial court had not abused its discretion "[b]ecause the district court gave [petitioners] a three-week continuance, during which time [they] could prepare for cross-examination of the expert witness" and because "the government had listed the witness in its pretrial report as a possible

witness, thereby putting petitioners on notice." *Id.* at PA41.[5]

ARGUMENT

Petitioners maintain that the district court abused its discretion in not granting a continuance of more than 24 days and in denying petitioners' motion for a new trial, and that the court of appeals erroneously rejected their claim. Petitioners' challenge to the district court's exercise of discretion is fact-bound and meritless, and does not warrant review.

The district court suspended the trial twice, once for six days as a result of its mid-trial order that the Secretary include expert testimony on the total amount of unpaid overtime compensation, and once for 24 days to permit petitioners "a reasonable opportunity to meet the government's evidence and to present their own." Pet. App. PA10. Contrary to petitioners' assertion (Pet. 6), the initial order directing the Secretary to present testimony on the total amount due did not "radically alter[] the case." And the ensuing testimony presented by the Secretary did not necessitate more than a 24-day continuance for petitioners to prepare a response.

As an initial matter, the pretrial order unmistakably stated that the Secretary's compliance officer was scheduled to testify not only about "his investigation activities on this case," but about "sample computations explaining the method by which overtime compensation found due may be calculated for all affected employees." Pet. 25. As a result of the

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[5] In addition, the court of appeals also rejected petitioners' contentions that the district court's determination regarding employee breaks was clearly erroneous, and that the record did not support a finding of willfulness. Pet. App. PA43-PA44.

court's order, the compliance officer simply extended his presentation of "sample computations" to include the calculations for all affected employees that were derived from application of the described methodology to the record evidence on hours worked by the individual employees. The court of appeals was thus correct in its observation that "[s]ince [petitioners were] aware that the expert might be called as a witness based on the list of witnesses in the pretrial order, [petitioners] cannot claim to be surprised that the court required his testimony." Pet. App. PA43.

Moreover, with regard to petitioners' claim that they were surprised by the scope of the compliance officer's testimony, the 24-day continuance to prepare cross-examination—four times the amount of time the Secretary was given to prepare the expanded testimony directed by the court—was fully sufficient to negate any potential prejudice. By their own account, petitioners initially told the court that two weeks would suffice. Pet. 10. On August 8, 1989, they asked the court "to adjourn this matter at least until August 21, 1989 or at a date and time to be fixed for September 1989." Pet. App. PA50.[6] The trial resumed on August 21, as requested, at which time petitioners cross-examined the compliance officer and proceeded with their own expert, who presented alternative computations on the amount of unpaid overtime. *Id.* at PA15, PA17.[7]

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[6] The compliance officer had testified on July 26, and since July 27, the trial had been suspended to allow petitioners preparation time. See Pet. 2; Pet. App. PA6.

[7] In view of these facts, it does not appear that the court of appeals was incorrect in observing that petitioners made no request for additional time. (See Pet. 15, 21-22.) In any event, in view of the ample time afforded, the question whether more time was sought is not a significant one.

Indeed, from all appearances, petitioners' efforts during the 24-day recess were expended on gathering evidence to support their own alternative computations. Pet. App. PA15-PA17; see also Pet. 13. Moreover, the need for such evidence, in order to reconstruct employment histories in the absence of proper records, did not originate with the court's order that the Secretary present a bottom-line figure on total unpaid overtime, or with the compliance officer's testimony in response to that order. Rather, petitioners' need for such evidence was apparent from the outset if petitioners were to defend against the allegations of overtime violations, and was a direct consequence of petitioners' "inexcusable failure to keep adequate records." Pet. App. PA21. See also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946) (absent proper records, the burden is on the employer "to come forward with evidence of the precise amount of work performed" or with evidence to rebut the employee's evidence of the amount of uncompensated work).

Finally, petitioners' claim of prejudice is untenable. When the trial resumed, petitioners simply complained about "the enormity of the task that [they] had undertaken," indicated that they had hoped, in addition to the considerable information they were able to adduce, to present a bar graph "show[ing] the percentage of days in which there was overtime and the percentage of days in which there were days worked less than eight hours," and expressed uncertainty as to whether they would actually use the graph if completed. See Pet. 10, 13. The district court's failure to grant a continuance of more than 24 days—and its denial of the new trial motion—was entirely appropriate, and was well

within the district court's broad discretion on such matters. See Pet. App. PA43.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioners' suggestion that the district court further abused its discretion in an unrelated evidentiary ruling denying petitioners' request to present a second expert witness (Pet. 14-15) is similarly meritless and unworthy of review. Petitioners presented extensive expert testimony (Pet. App. PA17-PA18), and the decision regarding additional testimony was a proper exercise of judicial discretion. See, *e.g.*, *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962) (lower court's decision to exclude or admit expert evidence will be sustained unless manifestly erroneous); *Hopkins* v. *Britton*, 742 F.2d 1308, 1311 (11th Cir. 1984) (court has discretion to reject cumulative testimony).

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